No. 92-1929

In the Supreme Court of the United States

OCTOBER TERM, 1993

DALE L. CARTER, ET AL., PETITIONERS

v.

JESSE BROWN, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

An Idaho statute limits the circumstances under which lenders may obtain deficiency judgments against borrowers following nonjudicial foreclosure sales of real property. The question presented is whether that Idaho statute applies to the Department of Veterans Affairs (VA) when the VA, having reimbursed a lender for the losses it incurred as a result of a default by a veteran on a VA-guaranteed loan, seeks to recover from the veteran, based not on its rights as a subrogee of the lender, but rather on its "independent right of indemnity," *United States* v. *Shimer*, 367 U.S. 374, 387 (1961).

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OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. C1-C15) is reported at 987 F.2d 611. The opinion of the district court (Pet. App. B1-B12) is reported at 758 F. Supp. 603.

JURISDICTION

The judgment of the court of appeals was entered on March 4, 1993. The petition for a writ of certiorari was filed on June 1, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1944, Congress created a program to guarantee home loans made to veterans (and, in certain cases, their spouses) by private lenders. Servicemen's Readjustment Act of 1944, ch. 268, Tit. III, 58 Stat. 291, codified as amended at 38 U.S.C. 3701-3733 (Supp. III 1991). The VA loan guaranty program, which was first administered by the Veterans Administration and is now administered by the Department of Veterans Affairs (collectively, the VA), generally enables veterans to obtain home mortgages more easily and on better terms than they otherwise could. In most cases, for example, lenders do not require down payments on homes purchased with a VA-guaranteed loan. See *United States* v. *Shimer*, 367 U.S. 374, 383 (1961). Moreover, the VA is authorized to establish a maximum interest rate for VA-guaranteed loans and to limit closing costs, loan origination and escrow fees, and other charges associated with a home loan. 38 C.F.R. 36.4312.[1]

Every veteran who participates in the VA loan guaranty program must sign a guaranty agreement with the VA stating that the veteran will be liable for all amounts paid by the VA in the event of the

[1] Prior to enactment of the Veterans Home Loan Program Amendments of 1992, Pub. L. No. 102-547, 106 Stat. 3633, the VA was required to establish a maximum interest rate for guaranteed loans, and that rate generally was below the market rate. See 38 U.S.C. 3703(c) (Supp. III 1991); 38 C.F.R. 36.4311. Section 10 of the 1992 Amendments, however, gives the VA the authority, which it has exercised, to forgo setting a maximum interest rate in favor of leaving the rate to be negotiated between individual veterans and lenders. 106 Stat. 3643. Loans closed prior to October 28, 1992, are not affected by this change.

veteran's default. That agreement is governed by federal law. See *Whitehead* v. *Derwinski*, 904 F.2d 1362, 1366 (9th Cir. 1990) (citing VA Form 26-1820 and 26-1802a); see also 38 C.F.R. 36.4334 (regulations issued under 38 U.S.C., Chapter 37 govern "rights, duties, and liabilities of the parties").[2] Consistent with the standard guaranty agreement, VA regulations state that "[a]ny amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by [that] veteran." 38 C.F.R. 36.4323(e).

If a veteran defaults on a VA-guaranteed loan, the lender may foreclose on the property in accordance with the law of the State in which the property is located. 38 U.S.C. 3720(a)(6) (Supp. III 1991); 38 C.F.R. 36.4319, 36.4320. The lender must first, however, give the VA 30 days' notice of its intent to do so. 38 U.S.C. 3732(a)(2) (Supp. III 1991); 38 C.F.R. 36.4317. The VA then has 15 days to give the lender instructions as to the appropriate timing and method of

[2] The Ninth Circuit in *Whitehead* referred to the agreement between the VA and the veteran as a "guaranty agreement." 904 F.2d at 1364. Strictly speaking, the term "guaranty" refers to the VA's obligation to pay the lender in the event of the veteran's default. See *Black's Law Dictionary* 634 (5th ed. 1979) ("Guaranty" is "[a] collateral agreement for performance of another's undertaking * * * that binds guarantor to performance in event of nonperformance by the principal obligor"). Nonetheless, for the sake of consistency, we will adopt the Ninth Circuit's usage, and use "guaranty agreement" to refer to the agreement between the veteran and the VA. In this connection, we note that petitioners err in identifying (Pet. 14, 15) the lender as a "guarantor," and the borrower as an "indemnitor." See *Black's Law Dictionary*, *supra*, at 634 ("Guarantor"), 692 ("Indemnitor").

foreclosure. 38 C.F.R. 36.4324(f); Pet. App. C2. If the lender follows the VA's instructions and a deficiency remains after the foreclosure sale, the VA will reimburse the lender up to the amount of the guaranty. 38 C.F.R. 36.4321.

Under its regulations, the VA may recover the amount it has paid to a lender pursuant to a loan guaranty in either of two capacities. First, it may recover as a subrogee of the lender, asserting any causes of action the lender would otherwise have had. 38 C.F.R. 36.4323(a). Second, the VA may recover in its own right under its guaranty agreement with the veteran. 38 C.F.R. 36.4323(e). The VA's right to recover in the latter capacity was recognized in *United States* v. *Shimer*, 367 U.S. 374, 386-387 (1961), where the Court construed a regulation substantially identical to one now in effect and held that the VA may recover against a veteran based not only "on a theory of subrogation to the mortgagee's rights," but also on "an independent right of indemnity."[3]

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[3] The current regulation, 38 C.F.R. 36.4323 ("Subrogation and indemnity"), provides in relevant part:

> (a) The Secretary shall be subrogated to the contract and the lien or other rights of the holder to the extent of any sum paid on a guaranty or on account of an insured loss, which right shall be junior to the holder's rights as against the debtor or the encumbered property until the holder shall have received the full amount payable under the contract with the debtor. No partial or complete release by a creditor shall impair the rights of the Secretary with respect to the debtor's obligation.
>
> * * * * *
>
> (e) Any amounts paid by the Secretary on account of the liabilities of any veteran guaranteed or insured under

The veteran may challenge the existence or amount of the debt prior to its collection by the VA, 38 C.F.R. 1.911(c)(1); in addition, the veteran may request a waiver of collection on the ground that he or she is not materially at fault and that collection would violate equity and good conscience. 38 U.S.C. 5302(b) and (c) (Supp. III 1991); 38 C.F.R. 1.911(c)(2). The veteran is entitled to a hearing on the waiver request, and may seek further review (as to either the validity of the debt or the propriety of waiver) before the Board of Veterans Appeals, 38 C.F.R. 1.911(c)(3), the Court of Veterans Appeals, and the Court of Appeals for the Federal Circuit. See Veterans' Judicial Review Act, Pub. L. No. 100-687, §§ 301, 402, 102 Stat. 4113, 4122.

Section 303 of the Veterans' Benefits Amendments of 1989 (1989 Amendments), Pub. L. No. 101-237, Tit. III, 103 Stat. 2071-2072, raised the loan fee veterans are required to pay the VA from 1% to 1.25% of the loan amount.[4] While Section 303 of the 1989 Amendments thus increased the initial burden on veterans under the loan guaranty program, Section 304 limited the liability of veterans who default on loans closed under the amended loan program. Under Section 304, any veteran who pays the new fee for a loan closed after December 31, 1989, (or is exempt from paying the fee because of a service-connected disability) will

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the provisions of 38 U.S.C. chapter 37 shall constitute a debt owing to the United States by such veteran.

* * * * *

[4] Congress later increased the fee to 1.875% for loans closed between November 1, 1990, and September 30, 1991. Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, Tit. VIII, § 8032, 104 Stat. 1388-348 to 1388-349.

not be liable to the VA for any loss resulting from the veteran's default on the loan, except in the case of fraud, misrepresentation or bad faith by the veteran in obtaining the loan or in connection with the default. 103 Stat. 2073, codified at 38 U.S.C. 3703(e)(1) (Supp. III 1991). Section 304 does not apply to loans closed on or before December 31, 1989. *Ibid.*

2. Idaho law provides two methods of foreclosing on security interests in real property. A lender may initiate a judicial foreclosure proceeding, in which the court supervises a sale of the property and, at the lender's request, may enter a deficiency judgment against the debtor for the difference between the total indebtedness and either the "reasonable value" of the property, as determined by the court, or the amount for which it was sold, whichever is higher. Idaho Code §§ 6-101, 6-108 (1990). Alternatively, a lender may effect nonjudicial foreclosure by advertisement and sale under a deed of trust. Idaho Code §§ 45-1505, 45-1506 (Supp. 1992); see generally Idaho Code §§ 45-1502 to 45-1510 (1977 & Supp. 1992). After a nonjudicial foreclosure sale, a lender may also seek a deficiency judgment against the debtor, but only if the lender seeks a judicial determination of the "fair market value" within three months after the sale. Idaho Code § 45-1512 (1977); *Tanner* v. *Shearmire*, 772 P.2d 267, 270 (Idaho Ct. App. 1989).

3. Petitioners are a class of veterans who bought residences in Idaho under the VA loan guaranty program. They filed this action in the United States District Court for the District of Idaho to challenge the VA's right of indemnification from veterans in cases in which the lender failed to seek a judicial determination of fair market value within three months after a nonjudicial foreclosure sale. Peti-

tioners sought to enjoin the VA from collecting from veterans in those cases and to require the VA to repay monies previously paid to it by veterans in such cases. See Pet. App. B4-B5.

The district court granted petitioners' motions for class certification and for summary judgment. Pet. App. B1-B12. It held that this case was controlled by the Ninth Circuit's decision in *Whitehead* v. *Derwinski*, 904 F.2d 1362 (1990). *Whitehead* concerned the law of Washington State, which, like Idaho, permits nonjudicial foreclosure but, unlike Idaho, entirely prohibits the entry of deficiency judgments following nonjudicial foreclosure sales. See *id.* at 1363. In *Whitehead*, the Ninth Circuit held that the VA forfeited its independent right of indemnity in any case in which it instructed the lender to proceed by nonjudicial foreclosure. *Id.* at 1365-1372. The Ninth Circuit in *Whitehead* determined that, as between the VA's right as a subrogee of the lender and the VA's independent right of indemnity, the subrogation right was "primary." *Id.* at 1369. In the *Whitehead* panel's view, the VA should be deemed to have elected to proceed exclusively by way of subrogation, and to have given up its right of indemnity, any time it instructed a lender to foreclose nonjudicially. As a subrogee of the lender, the VA then was subject to Washington's bar on lenders' recovery of deficiency judgments following nonjudicial foreclosures. The *Whitehead* panel distinguished cases involving state statutes that altogether prohibit the recovery of deficiency judgments following any type of foreclosure (judicial or nonjudicial); the court explained that, because such statutes eliminate the possibility of recovering from the veteran, they are preempted by

federal law establishing the VA's independent right of indemnity. *Id.* at 1368.

In this case, the district court concluded that, "based on the reasoning in *Whitehead* [and three district court decisions], it appears that for the VA to have preserved its right to recover via subrogation or indemnity, Idaho Code [§] 45-1512 required the VA (and/or the lenders involved) to seek a deficiency judgment within three months of any [nonjudicial] foreclosure sales that took place in Idaho." Pet. App. B9 (footnote omitted).

4. The VA appealed, and the case was briefed and argued to a panel of the Ninth Circuit. The panel subsequently withdrew submission, however, and the court of appeals issued an order directing that the case be reheard en banc. 970 F.2d 662 (1992). On rehearing en banc, the court of appeals overruled *Whitehead* and held that a lender's failure to obtain a judicial determination of the fair market value of mortgaged property could not prevent the VA from proceeding against a veteran based on its independent right of indemnity. Pet. App. C7-C11.

The en banc court of appeals rejected the basic premise of *Whitehead* that "the right of indemnity [is] merely a surrogate for the right of subrogation, available only when subrogation [is] impossible, i.e., in those states that prohibit all deficiency judgments." Pet. App. C6-C7. The court decided that "[t]he only reasonable conclusion [it could] reach from reading the regulation is that the right of indemnity stands on equal footing with the right of subrogation." *Id.* at C8. The court observed (*id.* at C10) that the "central assumption" of *Whitehead* had similarly "been examined and rejected by two other circuits," namely, the Seventh Circuit in *United States* v. *Davis*, 961 F.2d

603, 609-610 (1992), and the Eighth Circuit in *Vail* v. *Derwinski*, 946 F.2d 589, 591-592 (1991). The court concluded (Pet. App. C11):

> Regardless of the method by which a lender proceeds against a defaulting veteran—even when it does so at the VA's direction—the VA always possesses a right of indemnity against the veteran for the amount of guarantee paid to the lender. This is an independent right of indemnity, created by federal law, which state courts must honor.

The court emphasized that its conclusion was not based on preemption principles (*id.* at C12):

> State laws which affect lenders' ability to recapture additional amounts from veterans after foreclosure * * * do not affect the VA's independent right to seek recovery from veterans. Those laws are not preempted by federal law; they are simply irrelevant.

Judge Beezer, joined by Judges Hug, Fletcher and Brunetti, dissented. Pet. App. C12-C15. He believed that the VA's instruction to a lender to foreclose nonjudicially should be deemed a "consent[] to the veteran's release from liability." *Id.* at C14.

ARGUMENT

As the court of appeals recognized, this case is governed by *United States* v. *Shimer*, 367 U.S. 374 (1961). And contrary to petitioners' submission, no later decision of this Court undermines *Shimer*. Nor is there any conflict among the courts of appeals on the issue whether state anti-deficiency laws limit the VA's right of indemnity under the VA loan guaranty program. In any event, that issue is of steadily declining importance in light of recent federal

legislation that releases veterans from liability for deficiencies following foreclosure in all cases except those involving fraud or misrepresentation by the veteran. The petition for certiorari should therefore be denied.

1. a. In *Shimer*, this Court held that the VA's right of indemnity was not limited by a state law that restricted the right of a lender to recover a deficiency judgment after foreclosure. 367 U.S. at 386-388. The Ninth Circuit correctly concluded that *Shimer* controls this case. Pet. App. C7.

Shimer defaulted on a home loan by the Excelsior Saving Fund & Loan Association that was guaranteed by the VA. *Shimer*, 367 U.S. at 375-376. After Shimer's default, Excelsior purchased the home at a sheriff's sale and was then paid $4000 by the VA pursuant to its guaranty of Excelsior's loan to Shimer; Excelsior did not, however, seek a deficiency judgment against Shimer. *Id.* at 376. The VA subsequently brought an action against Shimer in federal court to recover the $4000 it had paid Excelsior. *Ibid.* The court of appeals held that the VA could not recover, either as a subrogee of Excelsior or directly under its guaranty agreement with Shimer; the court relied on a Pennsylvania law providing that a lender who purchased the mortgaged property at a foreclosure sale could obtain a deficiency judgment against the borrower only if it sought a judicial determination of the property's fair market value within six months after the sale and applied that amount to the outstanding indebtedness. *Id.* at 377. The court of appeals reasoned that Excelsior's failure to obtain a deficiency judgment released both Shimer and the VA from liability to Excelsior and that, under principles of surety law, the

VA as guarantor could not recover from its principal, Shimer, any amount that it was not obligated to pay Excelsior on Shimer's behalf. *Id.* at 376-377.

This Court reversed. It held, first, that the relationship between the VA and a veteran under the VA loan guaranty program is governed by federal law. *Shimer*, 367 U.S. at 377-381. It then rejected the veteran's argument that federal law authorized the VA to recover against a veteran only as a subrogee of the lender. The Court interpreted the VA loan guaranty statute, as implemented by a regulation substantially identical to the current regulation, to "afford[] an independent right of indemnity to the [VA]." *Id.* at 387. That regulation, the Court concluded, supported recovery by the VA without regard to the state law limiting the rights of the lender. *Id.* at 387-388. A contrary conclusion, the Court observed,

> would deprive the guarantor of any recovery on occasions when the mortgagee's rights were limited as against the debtor by state law, yet were protected against the Administrator by state or federal law. Relief from liability in these circumstances would convert a guaranty into a grant of aid. But the entire history of the "home loan" provisions of the statute is inconsistent with an intent to make outright grants, rather than loans of cash or credit, to returning servicemen.

Id. at 386-387 (citation omitted).

Shimer defeats petitioners' contention (Pet. 21, 36) that the federal regulation establishing the VA's right to recover the money it has paid as a result of the veteran's default is "silent" or "ambiguous."

Shimer held that that regulation gives the VA a right of indemnity that is not qualified by state law governing the rights of lenders.[5] That holding is controlling here.

b. Relying principally upon *United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979), and *Kamen* v. *Kemper Fin. Servs., Inc.*, 111 S. Ct. 1711 (1991), petitioners nevertheless contend that because Idaho's anti-deficiency law concerns real property, a matter "traditionally regulated by states" (Pet. 16), that law cannot be "preempt[ed]" (Pet. 19) or "displaced" (Pet. 21) by federal law—and, in particular, by the federal regulation, 38 C.F.R. 36.4323(e)—establishing the VA's right of indemnity. That contention is without merit.

As a threshold matter, petitioners err in characterizing this as a preemption case. Pet. 19. The Idaho statute upon which petitioners rely and the federal regulation establishing the VA's right of indemnity do not overlap; they address different subjects. Specifically, the Idaho statute concerns the right of a lender, following "any sale under a deed of trust," to obtain "a money judgment * * * for the balance due upon the obligation for which such deed of trust was given as security." Idaho Code § 45-1512 (1977). The Idaho statute thus addresses the rights of a lender,

[5] The VA has consistently interpreted the Servicemen's Readjustment Act of 1944, ch. 268, Tit. III, 58 Stat. 291, and the implementing regulation to establish a federal right of indemnity. See 1 Decisions of the Administrator of Veterans' Affairs, Veterans' Administration, No. 625, at 1154, 1157 (1945), cited in *Shimer*, 367 U.S. at 386, 387. The language of the pertinent regulation has remained essentially unchanged since its initial codification in 1946. Compare 11 Fed. Reg. 2118, 2123 (1946) with 38 C.F.R. 36.4323(e).

not the rights of a guarantor (such as the VA), and the "obligation" to which the Idaho statute refers is the borrower's obligation to the lender under the loan agreement, not the borrower's obligation to the guarantor of the loan under the guaranty agreement. In contrast, the federal regulation does specifically address the VA's right as a guarantor to recover from the veteran-borrower pursuant to the guaranty agreement between the veteran and the VA. Because the Idaho statute does not address that subject, the statute is, as the Ninth Circuit observed, "simply irrelevant" here. Pet. App. C12.[6]

In any event, assuming *arguendo* that Idaho law did address the rights of the VA as a guarantor, *Kimbell Foods* and *Kamen* would be inapposite. Those decisions concerned situations in which no federal

[6] Petitioners do not argue that the VA's rights under its guaranty agreement with a veteran should be governed by Idaho law concerning the rights of private parties to a guaranty agreement, an argument that might implicate preemption principles. Rather, they argue (Pet. 15) that the VA's rights as a guarantor should be governed by "the foreclosure laws of Idaho." But, as discussed in the text, the Idaho foreclosure laws address the rights of a lender, not a guarantor. Cf. *Black's Law Dictionary*, *supra*, at 634 ("The contract of a guarantor is his own separate contract. * * * The original contract of the principal is not his contract."). For the same reason, contrary to petitioners' suggestion (Pet. 31-32), it is irrelevant that federal law does not prescribe the procedures for foreclosing on residences purchased with a VA-guaranteed loan. That simply means that state law will govern the rights of lenders as against veteran-borrowers and, consequently, the VA's subrogation rights. The absence of a federal foreclosure procedure does not affect the VA's independent, federally created right of indemnity, which may be enforced through an action in federal court or by administrative offset. See generally 38 C.F.R. 1.900 *et seq.* (collection procedures).

statute or regulation addressed an issue that nonetheless was governed by federal law, and a federal court was accordingly called upon to determine "[w]hether to adopt state law or to fashion a nationwide federal rule." *Kimbell Foods*, 440 U.S. at 728. Here, the VA relies upon a federal regulation that this Court, in *Shimer*, had already construed to create a valid federal right. The *Kimbell Foods* inquiry therefore does not apply.[7]

This Court has never suggested that the *Kimbell Foods* analysis applies to a legal issue that has been specifically addressed by a validly promulgated federal regulation.[8] To the contrary, the Court has

[7] The Court stated in *Kamen* that "[t]he presumption that state law should be incorporated into federal common law is particularly strong in areas in which private parties have entered legal relationships with the expectation that their rights and obligations would be governed by state-law standards." 111 S. Ct. at 1717. The reference to "federal common law" indicates clearly that the Court's analysis was concerned with judge-made rules, not with rules established by federal statutes or regulations. Moreover, participants in the VA home loan program can hardly claim to have acted "with the expectation that their rights and obligations would be governed by state-law standards," since the guaranty agreements expressly state that the rights, duties, and liabilities of the parties will be governed by regulations issued pursuant to Title 38 of the United States Code.

[8] The Court in *Kimbell Foods* relied to a significant extent on its decision in *United States* v. *Yazell*, 382 U.S. 341 (1966). See 440 U.S. at 728-733. In *Yazell*, the Court rejected the government's effort to recover a deficiency under a federal common law theory. The Court noted, however, that "[w]e do not here consider the question of the constitutional power of the Congress to override state law * * * by appropriate authorization to an administrative agency coupled with suitable implementing action by the agency." 382 U.S. at 352. And the

repeatedly decided cases involving the preemptive force of federal regulations without citing *Kimbell Foods* or alluding to the factors enunciated therein. See *City of New York* v. *FCC*, 486 U.S. 57, 65-66 (1988); *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 698-700 (1984); *Fidelity Fed. Sav. & Loan Ass'n* v. *De La Cuesta*, 458 U.S. 141, 152-154 (1982). Indeed, this Court has continued to cite *Shimer* with approval for the proposition that an agency's decision to preempt state law must be sustained if it rests upon a reasonable construction of the governing statute. See *City of New York*, 486 U.S. at 64; *Capital Cities*, 467 U.S. at 700; *De La Cuesta*, 458 U.S. at 154.[9]

In *De La Cuesta*, decided three years after *Kimbell Foods*, the Court noted that established preemption principles "are not inapplicable here simply because

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Court cited *Shimer* as an example of the latter sort of case. *Id.* at 352 n.27. Thus, for more than twenty-five years, this Court has drawn a distinction between cases (such as *Yazell* and *Kimbell Foods*) that present a choice between state law and uniform federal common law, and cases (such as *Shimer*) involving the preemptive force of federal regulations.

[9] Contrary to petitioners' assertion (Pet. 42), recognition of the VA's right of indemnity does not frustrate Idaho law. Idaho courts may continue to deny deficiency judgments to lenders who fail to obtain a state court determination of the fair market value of mortgaged property as required by Idaho Code § 45-1512 (1977). At the same time, as the Ninth Circuit correctly held, Idaho's limits on recovery by lenders cannot be extended to restrict recovery by the VA under its independent, federally created right of indemnity. Cf. *Adams Fruit Co.* v. *Barrett*, 494 U.S. 638, 648 (1990) ("we refuse to adopt Adams Fruit's 'reverse' pre-emption principle that would authorize States to withdraw federal remedies by establishing state remedies as exclusive").

real property law is a matter of special concern to the States: 'The relative importance to the State of its own law is not material when there is a conflict with a valid federal law, for the Framers of our Constitution provided that the federal law must prevail.'" 458 U.S. at 153 (quoting *Free* v. *Bland*, 369 U.S. 663, 666 (1962)). Because this Court has continued to cite *Shimer* as stating the standard to be applied in determining the preemptive effect of federal regulations, and has reaffirmed the applicability of that standard to regulations bearing on real property, there is no basis for petitioners' suggestion that the VA's indemnity regulation can be superseded, or its application restricted, by Idaho law.[10] See also *United States* v. *Oregon*, 366 U.S. 643, 648-649 (1961) (rejecting Tenth Amendment challenge in similar context).

2. Two other courts of appeals have addressed the question whether the VA's right of indemnity under the loan guaranty program is limited by state anti-deficiency laws. Both courts, like the en banc Ninth Circuit in this case, relied on *Shimer* to hold that the VA's right of indemnity was not qualified by such

[10] This Court's decision in *United States* v. *California*, 113 S. Ct. 1784 (1993), is not to the contrary. In that case, the Court held that the circumstances surrounding California's assessment of a tax against a contractor of the federal government did not give rise to "a federal common law action for the recovery of state taxes." *Id.* at 1788. In the present case, the VA does not depend on a federal common law theory of recovery, but rather on a right of recovery established by a federal regulation implementing the loan guaranty program created by Congress. *United States* v. *California* is therefore inapposite.

laws.[11] Except for the now-overruled Ninth Circuit decision in *Whitehead*, no court of appeals has reached a contrary conclusion.

In *United States* v. *Davis*, 961 F.2d 603 (1992), the Seventh Circuit rejected the contention that the VA was barred from collecting indemnification where the lender pursued an expedited foreclosure procedure that, under state law, prohibited the lender from obtaining a deficiency judgment. The court stated: "We believe that *Shimer* is directly applicable to this case and therefore choose to follow its lead in sustaining the VA's independent federal indemnity right." *Id.* at 610. The court determined that "the VA's subrogation and indemnification rights are independent, legitimately promulgated, federal rights," and that there was consequently "no basis on which to require the VA to privilege its subrogation right over its indemnification right." *Id.* at 611.

The Eighth Circuit reached a similar conclusion in *Vail* v. *Derwinski*, 946 F.2d 589 (1991). Although the Eighth Circuit relied to a large extent on state law—which it construed as "affirmatively recogniz[ing] that rights of third parties under contracts of guaranty survive the anti-deficiency laws," *id.* at 592—the court also recognized that "*Shimer* makes clear that indemnity is an independent remedy." *Id.* at 592 n.7. Moreover, the court expressly rejected (*ibid.*) the reasoning of *Whitehead*:

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[11] See also *Boley* v. *Principi*, 144 F.R.D. 305, 309-310 (E.D.N.C. 1992) (rejecting *Whitehead* and holding that state-law notice requirements cannot impair the VA's right to indemnification), appeal pending, No. 93-1067 (4th Cir. argued June 7, 1993).

> The *Whitehead* court provided no support for its conclusion that the VA's indemnity right was essentially a backup for subrogation. By requiring the VA to choose a foreclosure route and accept the state law consequences, the *Whitehead* court chose to limit the VA's remedies and effectively nullify the VA's right to indemnity.

In the present case, the Ninth Circuit sitting en banc decided to "join the Seventh and Eighth Circuits and hold that *Whitehead* was incorrectly decided." Pet. App. C11. The en banc process has thus resolved any prior conflict among the circuits, and review by this Court is not necessary to maintain uniformity.

Moreover, recent amendments to the VA loan guaranty program ensure that the question presented here will affect a continually decreasing number of veterans over the coming years. As discussed earlier, at pp. 5-6, *supra*, Section 304 of the 1989 Amendments to the VA loan guaranty program provides that veterans whose loans are closed after December 31, 1989, will not be liable to the VA for any loss resulting from a default on such loans, except in cases involving fraud, misrepresentation or bad faith by the veteran in obtaining the loan or in connection with the default. 38 U.S.C. 3703(e)(1) (Supp. III 1991). Thus, the question presented is of steadily declining significance.[12]

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[12] Petitioners err in asserting that under the Ninth Circuit's decision veteran debtors are treated more harshly than are "other defaulting home owners under state law." Pet. 15. Participants in the VA loan guaranty program receive substantial advantages, both when the loan is closed and at the time of default, that are unavailable to other mortgage debtors in Idaho. See *Davis*, 961 F.2d at 610-611 & n.11.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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